Michigan Law Review

Volume 58 | Issue 2

1959

Labor Law - Federal Pre-Emption - Limitations on State Jurisdiction in Causes Arising Out of Labor Disputes

Robert J. Margolin S.Ed.
University of Michigan Law School

LABOR LAW—FEDERAL PRE-EMPTION—LIMITATIONS ON STATE JURISDICTION IN CAUSES ARISING OUT OF LABOR DISPUTES—Respondent employers refused to enter a union shop agreement with the petitioning unions, who then

began to picket peacefully and to exert pressure on respondents' suppliers and customers to persuade them to cease dealing with respondents. Respondents initiated a representation proceeding before the NLRB, which declined jurisdiction on the ground respondents' business did not have a sufficient effect on commerce to meet the NLRB's self-imposed jurisdictional standards. Respondents then sought and obtained damages and an injunction in the California courts.[1] On certiorari to the United States Supreme Court the injunction order was reversed, but the question of damages was remanded to the state court since it was unclear whether the damages were sustained under California or federal law.[2] The state court sustained the damages on the basis of state law.[3] On certiorari to the United States Supreme Court, *held,* reversed, four justices concurring in result only.[4] Absent an NLRB determination that an activity is neither protected nor prohibited, or compelling precedent applied to essentially undisputed facts, state courts have no jurisdiction to award damages for losses arising out of such activity even if based on tort liability theories under state law. *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959).

The corrective measures of section 701 (a) of the recent Labor-Management Reporting and Disclosure Act[5] will alleviate much of the distress which was created when the NLRB carved out the so-called no-man's-land by declining jurisdiction on its own monetary standards.[6] In this area, where the impact on commerce is existent but relatively slight, states are now free to regulate labor-management relations without regard to whether the regulated conduct is otherwise federally protected or prohibited by the amended National Labor Relations Act.[7] Thus the principal case is no longer significant in this former no-man's-land. But in cases satisfying the NLRB's jurisdictional standards, the new statute has no effect and the principal case remains authoritative.

In previously attempting to outline areas where state regulation of labor problems was excluded, the Court created a welter of confusion. This

1 45 Cal. (2d) 657, 291 P. (2d) 1 (1955).

2 353 U.S. 26 (1957).

3 49 Cal. (2d) 595, 320 P. (2d) 473 (1958).

4 Justices Harlan, Clark, Whittaker, and Stewart concurred.

5 H. Rep. 1147, 86th Cong., 1st sess., p. 3181 (1959), 25 U.S. LAW WEEK 5 (1959). This section amends §14 of the National Labor Relations Act, as amended, by adding subsections (c) (1) and (c) (2). Subsection (c) (1) provides that the NLRB may decline jurisdiction over labor disputes which the Board feels do not have a substantial effect on commerce. Subsection (c) (2) provides that where the Board declines jurisdiction pursuant to § (c) (1), the act shall not be deemed to prevent the states from asserting jurisdiction.

6 In 1954 the NLRB withdrew its plenary jurisdiction from a number of areas on the basis of a marked upward swing in the dollar volume criteria applied, thus leaving a vast area of labor-management relations unregulated. See Press Release R. 449, July 15, 1954, as reported in 34 L.R.R.M. 75 (1954). This was changed again on October 2, 1958, by Press Release R. 576, but the changes leave unaffected the statements in this note. See 5 CCH LAB. L. REP., 4th ed., ¶50,086, ¶50,092 (1958).

7 Labor-Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. (1952) §151 et seq.

confusion originated in *Garner v. Teamsters Union, A.F.L.*,[8] where to promote uniform substantive and procedural rules over subject matter within the NLRB's purview, the Court held that a state may not afford relief for conduct subject to NLRB regulation.[9] This sweeping declaration was later given a restrictive interpretation in *United Construction Workers v. Laburnum Construction Corp.*,[10] which held that the LMRA did not pre-empt state tort remedies. The manner in which *Laburnum* would be construed and the extent of its projection was conjectural at the time. Narrowly construed, *Laburnum* would permit state damage remedies only in cases of violence.[11] However, the language of that opinion strongly suggested that the pre-emption idea precluded only conflicting remedies.[12] This view was seemingly adopted in two subsequent decisions which awarded damages to employees for economic rather than personal injury or property losses.[13] Although it appeared in both instances that the NLRB, by exercising its discretionary back-pay powers, could have afforded a similar remedy, the remedy for loss of wages given by the state courts was held not to conflict with any remedy given by the federal act.[14] In the principal

8 346 U.S. 485 (1953).

9 Id. at 499-500. Justice Frankfurter stated, "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions."

10 347 U.S. 656 (1954).

11 Id. at 658-659. Certiorari was granted with regard to the "type of conduct" involved. See Meltzer, "The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: I," 59 COL. L. REV. 6 at 31-32 (1959).

12 Justice Burton, speaking for the Court in Laburnum (347 U.S. 656 at 665), emphasized the lack of conflicting remedies and stated: "To the extent . . . Congress has not prescribed procedure for dealing with the consequences of tortious conduct . . . there is no ground for concluding that . . . liabilities for tortious conduct have been eliminated. The care we took in the *Garner* case to demonstrate the existing conflict . . . was, itself, a recognition that if *no conflict had existed,* the state procedure would have survived." (Emphasis added.) See note, 40 CORN. L. Q. 156 at 160 (1954). Accepting this interpretation, Laburnum should apply to peaceful as well as violent picketing. There could be no conflict between state and federal remedies, because the Labor-Management Relations Act, note 7 supra, with the exception of §10(c), [61 Stat. 147 (1947), 29 U.S.C. (1952) §160(c)], which permits discretionary back-pay, and §303 [61 Stat. 158 (1947), 29 U.S.C. (1952) §187], which allows damages for violations of secondary boycott provisions, does not mention damage awards for activities covered by §8 [61 Stat. 140 (1947), 29 U.S.C. (1952) §158]. To deprive plaintiff of a common law action would be to immunize the tortious conduct of defendant.

13 Intl. Assn. of Machinists v. Gonzales, 356 U.S. 617 (1958); Intl. Union, United Automobile, Aircraft and Agricultural Implement Workers v. Russell, 356 U.S. 634 (1958). See also Weber v. Anheuser-Busch, Inc., 348 U.S. 468 at 477 (1955), where the Court refers to the lack of conflict.

14 Section 10(c) of the Labor-Management Relations Act, note 12 supra, provides authority for back-pay awards. Contrary to the majority argument that back-pay would effectuate the policy of the act without actually redressing the employee's injuries, Chief Justice Warren and Justice Douglas, who dissented in both the Russell and Gonzales cases, argued that an award of damages by a state court conflicted with §10(c) remedies and discouraged actions before the NLRB.

case, however, the action was by the employer against the union, a situation outside the backpay powers of the NLRB.[15] *A fortiori,* that damages would be allowed in this case seemed unquestionable. Nevertheless, the Court disallowed damages and in so doing impliedly overruled all prior language suggesting that it was the conflicting nature of the state remedy, rather than the nature of the conduct, which precluded state jurisdiction. Moreover, in recharting the area of federal supremacy, the Court's holding seems to have drawn the circle of permissible state regulation even tighter. Although the Court might have intended to preserve the integrity of state authority in well-settled areas such as violence, its language seems to restrict state authority even here. Giving the holding a literal interpretation, it would seem that in the future almost every case will require a primary determination by the NLRB. Only when the facts of a case are identical to precedent cases where state-given remedies have been allowed and are essentially undisputed by either party, which is highly improbable, will a state be authorized to hear a case otherwise falling within the jurisdiction of the NLRB. This pervasiveness seems effectually to undermine reliance on precedents in all unprotected areas formerly left to the states, since any dispute will require an NLRB determination as to the essential facts regardless of whether the activity has previously been held to fall within an unprotected category.[16] Initially, the concurring opinion, which dissents from all but the result, appears more liberal since the concurrers would allow the states to assert jurisdiction where the activities are neither protected nor prohibited,[17] or where the activities are unprotected and prohibited but no conflict of remedies exists.[18] Yet the fact that they believe that the NLRB might have found the activity in the principal case to be protected seems to imply recognition of the basic reality that controversies would arise in almost any case as to whether the activity was protected or not. Although the concurring justices would allow states to give damage remedies with regard to prohibited and unprotected activities, the necessity of a primary NLRB determination of whether the activity in a particular case was protected, prohibited, or unprotected would render their views not significantly divergent from those of the majority. Nevertheless, the decision is arguably justifiable in view of the desire for a uniform national labor policy. To allow a state to be the arbiter of what is protected or prohibited would be

[15] Section 10 (c), note 12 supra, expressly permits back pay only for employees.

[16] E.g., Allen-Bradley v. WERB, 315 U.S. 740 (1942) (intermittent work stoppages); Algoma Plywood and Veneer Co. v. WERB, 336 U.S. 301 (1949) (cease and desist order and order for reinstatement with back pay); Intl. Union, UAW, AFL v. WERB, 336 U.S. 245 (1949) (intermittent work stoppages).

[17] Principal case at 251, 253-254.

[18] Principal case at 251-252. On this ground Justice Harlan concludes that he "would adhere to the *Laburnum* and *Russell* distinction between damages and injunctions." Id. at 254.

to imperil the supremacy of the federal act.[19] Moreover, to concede state jurisdiction because the remedy afforded is damages rather than an injunction would be merely to condone an approach from the rear where one has already been foreclosed from the front.[20]

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[19] Principal case at 244. See the discussion of this question in Meltzer, "The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: I," 59 COL. L. REV. 6 at 39 (1959).

[20] While a reversal of an erroneous judgment for damages will restore a defendant to his status quo, the strength of a strike might be dissipated before an injunction could be dissolved. Some have argued this difference justifies allowing states to give the damage remedy which is not offered in Labor-Management Relations Act. See comment, 35 TEX. L. REV. 555 at 566 (1957).